

ANANDAN v. SAJJAN SINGH & ANOR.[C. A. (Willan C.J., Spenser Wilkinson and Russell JJ.)
October 8, 1948]

[K. L. — F.M. Civil Appeal No. 15 of 1948]

Practice — F.M.S. Rules of Supreme Court, 1935 Rule No. 1, Sub-rr. 10, 13 and 15 — Application for extension of time within which to file record of appeal — Emergency (Criminal Trials) Regulations, 1948, regs. 3, 18(2) and 21.

In this case the appellant appealed against a judgment of the High Court delivered on the 4th of June 1948. The notice of appeal was filed on the 23rd of June 1948 within the prescribed time. By virtue of the Emergency (Criminal Trials) Regulations 1948, the memorandum of appeal should have been filed on or before the 4th of August 1948. It was not presented for filing until the 10th September 1948, and a motion was filed by the appellant for an extension of the time within which to file the memorandum.

Held: (1) notwithstanding reg. 18(2) of the Emergency (Criminal Trials) Regulations 1948 the Court has power under 1935 Rule No. 1, sub-r. 13(2) to enlarge the time for filing a memorandum of appeal when sufficient cause is shown for the delay in presenting it for filing; (2) on the facts of this case no sufficient grounds had been shown for extending the time and therefore the Motion must be dismissed.

[**Editorial Note:** Since this decision regulation 18 of the Emergency (Criminal Trials) Regulations, 1948, has been revoked by L.N. 3 of 1949.]

Cases referred to:—

- (1) *Gatti v. Shoosmith* (1939) 1 Ch. 841.
- (2) *In re Coles and Ravenshear* (1907) 1 K.B. 1.

MOTION for extension of time.

N. A. Marjoribanks for the appellant.

B. J. P. Joaquim for the respondent.

Willan C.J. (with whom **Spenser Wilkinson** and **Russell JJ.** agreed).—In this case the appellant appealed against a judgment of the High Court delivered on the 4th of June, 1948. The notice of appeal was filed on the 23rd of June, 1948, within the prescribed time.

In the ordinary way, by sub-rule 10 of 1935 Rule No. 1, the memorandum of appeal, which includes all the documents described in sub-rule 15 (the whole making up the record of appeal), must be filed within twelve days of the sitting of the Court of Appeal.

But during the present Emergency, the record must be filed within six weeks of the filing of the notice of appeal. This is so by Regulation 18(2) of the Emergency (Criminal Trials) Regulations, 1948, which reads:—

In any civil appeal from the High Court the record shall . . . be filed within six weeks after the notice of appeal is given.

By Regulation 1 thereof, those Regulations came into force on the 19th of July, 1948, and by Regulation 21 thereof, Regulation 18(2) applies to appeals commenced prior to the coming into operation of the Regulations.

Therefore, the memorandum of appeal in this case should have been filed on or before the 4th of August, 1948. It was not presented to the Registrar for filing until the 10th September, 1948, which necessitated a Motion by the appellant for an extension of time in which to file the memorandum.

Mr. Marjoribanks, for the appellant, informed us that after judgment had been given against the appellant in the High Court, an application was made by him for stay of execution; that this application came on for hearing in the High Court on 16th July, 1948, and was then adjourned by consent of both parties, and that owing to the Registrar not being able to give a subsequent date earlier than the 9th August, 1948, the order for stay was not made until that date, by which time the period for filing the memorandum of appeal i.e. by the 4th August, 1948, had expired.

Mr. Marjoribanks further stated that he had no instructions from the appellant to file the memorandum of appeal prior to an order for stay being made, because the appellant was not in a position to proceed with the appeal in the event of an order for stay being refused.

Asked by this Court whether, on the coming into operation of the Emergency (Criminal Trials) Regulations, 1948, on the 19th of July, 1948, he had informed the Registrar, Supreme Court, that it was essential for the application for stay to be brought on before the High Court urgently, since time was running against him for filing the memorandum of appeal, Mr. Marjoribanks admitted he had not done so.

Asked further why he had not prepared, and presented for filing, the memorandum of appeal as soon as possible after the order for stay made on the 9th August, 1948, instead of waiting until the 10th September, 1948, Mr. Marjoribanks replied that at the hearing of the application for stay on the 9th August, 1948, the respondents had not made any objection; that by then the time for filing the memorandum of appeal had expired; and also that as he was by that date out of time, he considered there was no point in

presenting the memorandum for filing until it was known when the Court of Appeal was to sit in Kuala Lumpur. He was served with notice on the 25th August, 1948, that this appeal was listed for hearing on the 27th September, 1948, and, as stated earlier in this judgment, the memorandum of appeal was not presented for filing until the 10th of September, 1948.

Mr. Joaquim for the respondents submitted :—

- (a) That the Court of Appeal has no power to extend the time prescribed by Regulation 18(2) of the Emergency (Criminal Trials) Regulations, 1948.
- (b) That, in the event of this Court disagreeing with his first submission, the appellant had not shown sufficient cause to justify an order for extension of time being made.

With regard to submission (a), his argument was that whilst this Court has power to enlarge the time prescribed by ordinary legislation such as the Civil Procedure Code and the Rules of Court, it has no power to enlarge time prescribed by the Legislature in the Emergency (Criminal Trials) Regulation, 1948, made under the Emergency Regulations Ordinance, 1948, particularly in view of section 5(1) thereof, which reads :—

Every regulation and every notification shall have effect notwithstanding anything inconsistent therewith contained in any other written law.

He also referred to Regulation 3 of the Emergency (Criminal Trials) Regulations, 1948, which reads :—

The provisions of these Regulations shall have effect notwithstanding anything to the contrary contained in any written law, but, except in so far as the same may be varied by these Regulations or by other Regulations made under the Emergency Regulations Ordinance, 1948, the ordinary practice and procedure of the Courts shall apply to emergency procedure cases tried under these Regulations.

He pointed out that this Regulation only saves the ordinary practice and procedure of the Court in respect of emergency cases, which are criminal cases, and is silent as regards the practice and procedure in respect of civil cases.

Mr. Joaquim did not press this argument, and pointed out that he felt he should place it before the Court because it is a matter of jurisdiction. The Court of Appeal is grateful to Mr. Joaquim for bringing this matter to its notice.

It is true that Regulation 3 is silent as to what happens in respect of the ordinary practice and

procedure in civil cases and, in my view, this indicates a clear implication that, except in so far as the Emergency (Criminal Trials) Regulations, 1948, vary such practice and procedure, the ordinary practice and procedure continue. Express provision in these Regulations would be necessary to do otherwise.

Regulation 18(2) of the Emergency (Criminal Trials) Regulations, 1948, only governs one specific matter, and that is the time in which a memorandum of appeal shall be filed. To that extent it suspends the operation of sub-rule 10 of 1935 Rule No. 1. It does not deprive this Court of its power under the second paragraph of sub-rule 13 of enlarging the time for filing a memorandum of appeal when sufficient cause is shown for the delay in presenting it for filing. The second paragraph of sub-rule 13 reads :—

If the memorandum with the copies thereof be not filed within the period prescribed by sub-rule 10 and no sufficient cause be shown for the delay the appeal shall be dismissed or postponed to the next sitting of the Court of Appeal upon such conditions as to costs or otherwise as the Court of Appeal may deem fit.

Accordingly I have no hesitation in rejecting Mr. Joaquim's first submission.

With regard to his second submission, Mr. Joaquim pointed out that, under sub-rule 13 of 1935 Rule No. 1, the appellant must show sufficient cause for the delay before any order extending the time can be made. He referred to English Order 58 rule 15, prior to it being amended in 1909, when an order to extend the time required special leave of the Court of Appeal. After that rule was amended in 1909, the discretion of the Court of Appeal to grant an extension is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised—see *Gatti v. Shoosmith*⁽¹⁾.

In my view our local sub-rule 13 of 1935 Rule No. 1 does not leave the Court of Appeal perfectly free as is the case in England under Order 58 rule 15, after its amendment in 1909, nor is our local sub-rule 13 so stringent as English Order 58 rule 15 prior to its amendment. I would say, however, that our local sub-rule 13 approaches nearer to English Order 58 rule 15, prior to its amendment, than after its amendment.

So far as the legal adviser of an appellant is concerned, the English decided cases do show that,

prior to Order 58 rule 15 being amended, mistake of counsel was not accepted by the Court of Appeal as a special ground for extending the time in which to appeal—see, for instance, the case of *In re Coles & Ravenshear*⁽²⁾. But after that rule was amended, mistake by the legal adviser of an appellant may be accepted as proper ground for extending the time, though whether it will be accepted depends on the facts of the particular case.

In the case before this Court there was no mistake either by the appellant's legal adviser or by the appellant himself.

First, the appellant took the risk of not instructing his legal adviser to file the memorandum of appeal until an order for stay had been made. Having done that deliberately he cannot now be heard to say that he should have an extension of time in which to file an appeal because the order for stay was not made until after the time for filing his memorandum of appeal had expired. He could have filed his memorandum of appeal whilst the application for stay of execution was pending.

Secondly, his legal adviser, who was well aware of the new procedure in Regulation 18(2) of the Emergency (Criminal Trials) Regulations, 1948, should have applied to the Registrar, Supreme Court, for the application for stay to be heard promptly immediately those Regulations came into force. He ought not to have taken the risk of waiting and trusting to obtaining an order for extension on this Motion before the Court of Appeal.

Thirdly, I should have been inclined to view this application with more sympathy, if, as soon as the order for stay had been made, the memorandum of appeal had been presented for filing. This was not done.

Hence, I cannot see on these facts, that the case of *Gratti v. Shoosmith*⁽¹⁾, *supra*, relied on by the appellant, is in point, because in that case there was a genuine mistake, which is not so in this case; also, in that case the attempt to enter the appeal was only eight days out of time, whereas in this case the memorandum of appeal is five weeks and two days out of time.

Accordingly I do not find that sufficient grounds have been shown for extending the time, and the Motion must be dismissed with costs. The only appropriate consequential order to make under sub-rule 13 of 1935 Rule No. 1 regarding the appeal is that it is dismissed with costs.

Motion dismissed.

TAN AH CHEE & ANOR. v. REX

[A. Cr. J. (Gordon Smith Ag. C.J.) October 14, 1948]

[Singapore—Magistrate's Appeal No. 105 of 1948]

Penal Code, ss. 441 and 451—Criminal trespass—Proof of.

In this case the accused were found sleeping on a ship in the harbour. It appeared that they were coolies employed to carry goods and that they had fallen asleep after finishing their business and were waiting for their sampans. They were convicted under s. 451 of the Penal Code for criminal trespass.

Held: that there was no evidence in this case that the accused had any intention to commit any offence and therefore in the absence of proof of criminal trespass, the accused must be discharged.

MAGISTRATE'S APPEAL.

R. S. Johnson for the appellant.

A. V. Winslow (D. P. P.) for the respondent.

Gordon Smith Ag. C.J.:—The first point for consideration, and the main point, in this appeal is whether criminal trespass had been proved.

The section under which the accused were charged, section 451, says "Whoever commits house trespass in order to the committing of an offence the term of the imprisonment may be extended to seven years", and 'criminal trespass' is stated and defined in section 441 "Whoever enters into or upon property in the possession of another with intent to commit an offence is said to commit 'criminal trespass'".

It is said that there is a prohibition on hawkers from visiting or carrying anything to ships which are discharging or loading rice in the Harbour, and that fact should have been proved by producing some regulation to that effect or the master or some other officer of the ship should have been produced to show that the appellants went on board the ship and remained there against his orders and that such was unlawful. If not actual licensees, these two appellants were apparently employed by licenceholders and this appears to be a customary practice and, according to the defence, they went to the ship to carry on their business, but when arrested they were found to be asleep. The accused explained that they did so after they had finished their business and were waiting for their sampans. They were questioned by the Marine Police but the Marine Police made no proper search to ascertain whether there was any property or materials which would have been relevant to the case one way or the other, either for the prosecution or for the defence.

In the absence of any proof of criminal trespass their appeals must succeed and the appellants are discharged.

Appeals allowed.